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No. 881

In the Supreme Court of the United States

October Term, 1929.

HENRY CHOTEAU, *Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR WRIT OF *CERTIORARI* TO THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

T. J. LEAHY,
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Tulsa, Oklahoma,
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IN THE SUPREME COURT OF THE UNITED STATES.

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No. ____

HENRY CHOTEAU, *Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR WRIT OF *CERTIORARI* TO THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

May It Please the Court:

The petition of Henry Chouteau respectfully shows to this honorable court:

Summary Statement of the Matters Involved.

The petitioner, Henry Chouteau, is an Osage Indian, who was duly allotted as such under the Act of Congress of June 28, 1906 (34 Stat. L. 539).

He applied for and received from the Secretary of Interior a certificate of competency bearing date of March 5, 1910, which is provided for in paragraph seven (7), section two (2) of the act above referred to.

The proceeding was originally instituted before the Board of Tax Appeals by your petitioner filing before said Board his petition for redetermination of the deficiency claimed against him for income taxes for the years 1918, 1919 and 1920.

The petition for the redetermination of the tax filed in the United States Board of Tax Appeals appears on pages two (2) to six (6), inclusive, of the transcript of the record. The answer of the Commissioner of Internal Revenue appears on page seven (7) thereof. An agreed statement of facts was entered into which appears on pages eight (8) and nine (9) of the record.

The Board of Tax Appeals decided adversely to your petitioner, and thereupon, and in due course, he filed a petition for review thereof in the Circuit Court of Appeals of the United States for the Tenth Circuit (transcript of record, page 12). The Circuit Court of Appeals affirmed the ruling of the Board of Tax Appeals on February 5th, 1930. A full, true and complete copy of the opinion of said court appears in the transcript of record at page 26-32 thereof.

The case in the Circuit Court of Appeals was argued and submitted to that court, together with the case of *Mary Blackbird* v. *Commissioner of Internal Revenue*, and the case of *Mrs. Amarillis D. Pettit* v. *Commissioner of Internal Revenue*. Mary Blackbird is a member of the Osage tribe of Indians to whom a certificate of competency had not been granted, and Amarillis D. Pettit, a white woman and not a member of the tribe, was the mother and heir of two deceased minor members of the Osage tribe of Indians who

did not have certificates of competency and who were duly enrolled and allotted as members of said tribe under the Act of Congress of June 28, 1906 (34 Stat. L. 539), and these facts constitute the principal difference between each of the three cases, the principal income of each party coming from the same source, to-wit: the mineral interests of the Osage tribe of Indians as provided in said Act of Congress of June 28, 1906. Each of these cases were selected from a group of cases involving the same questions. The remaining cases are still pending before the Board of Tax Appeals waiting the final decision herein.

The Circuit Court of Appeals reversed the ruling of the Board of Tax Appeals in the *Blackbird* case and held, in substance, that the income tax statute Act of 1918 (40 Stat. 1057) did not apply to her because she had never received a certificate of competency, but, as above stated, affirmed the ruling of the Board of Tax Appeals in this case because Henry Chouteau did have a certificate of competency and was, therefore, no longer a ward of the government, and, also, affirmed the ruling in the *Pettit* case because she was not a member of the Osage tribe of Indians and was not a ward of the government.

The income of your petitioner for the years in question (1918, 1919 and 1920) was his *pro rata* share from the tribal mineral leases given with the approval of the Secretary of Interior under the Act of June 28, 1906, above referred to and involves no other income whatsoever.

Petitioner alleges that, he being a member of the Osage tribe of Indians and duly enrolled as such is and was a

ward of the government, and his income for the years in question (1918, 1919 and 1920) being derived solely from his *pro rata* share of the bonuses and royalties on mineral leases made by the Osage tribe of Indians through its tribal council with the approval of the Secretary of the Interior, under the provisions of said Act of June 28, 1906, above referred to, said funds are not subject to an income tax; that the Osage tribe of Indians is not included among those persons, firms, corporations, *et al.*, required to file an income tax return; that the Congress of United States may not impose a tax under the Constitution of the United States on the income received by said tribe of Indians, nor has it attempted to do so; and the income of the tribe not being subject to a tax, it cannot be subjected thereto upon distribution to the individual members thereof, or their heirs, for the reason that it would be taxing income which was exempt from taxation at its source.

Reasons Relied on for the Allowance of the Writ.

I.

Petitioner asks for a review and reversal of the judgment of the Circuit Court of Appeals in holding that your petitioner is no longer a ward of the government for the reason that a certificate of competency had been issued to him under paragraph seven (7), of section two (2) of the Act of June 28, 1906, above referred to, and contends that in such conclusion said court overlooked the applicable provisions of the Act of June 28, 1906, and the following supplementary and amendatory acts thereof, to-wit:

Act of April 18, 1912 (37 Stat. L. 86);

Act of March 3d, 1921 (41 Stat. L. 1249);
Act of April 12, 1924 (43 Stat. L. 94);
Act of February 27, 1925 (43 Stat. L. 1008);
Act of March 2, 1929 (45 Stat. L. 1478).

And overlooked the proposition that the certificate of competency did not remove the restrictions on your petitioner's interest in the mineral interests of the Osage tribe of Indians, and the same is still held in trust for him by the United States, and, also, overlooked the fact that it was not until March 3, 1921, that restrictions against alienation of Chouteau's homestead were removed regardless of quantum of blood.

II.

That your petitioner asks for a review of the judgment of the Circuit Court of Appeals for the reason that it decided an important question of federal law which has not been and should be settled by this court as to whether or not the income of the Osage tribe of Indians derived from tribal sources is subject to the income tax laws of the United States on distribution to the members of said tribe and contends that the issuance to him of the certificate of competency, under the provisions of the Act of June 28, 1906, does not in view of other applicable sections of the federal statutes (above referred to) have the effect of discontinuing the wardship existing between your petitioner and the government of the United States, but that said Act of Congress specifically continues the wardship existing between your petitioner and the government of the United States.

III.

Your petitioner asks for a review of the decision of the Circuit Court of Appeals where it held, in effect, that although the bonuses and royalties from mineral leases on tribal property were paid to the government of the United States, and, after the expenses of said tribal government and tribal affairs were paid out of the same, the remainder was distributed by the government to the individual members of the tribe as provided in the Acts of Congress of June 28, 1906, March 3d, 1921, and February 27, 1925, *supra*, was subject to an income tax when paid to members of the tribe having certificates of competency, overlooking the fact that said bonuses and royalties so long as held by the United States was trust property held for the use and benefit of said Osage tribe of Indians, and the members thereof, and was, therefore, not included within the various income tax laws of the United States.

IV.

Petitioner asks for a review and reversal of the findings and conclusions of said Circuit Court of Appeals on the ground and for the reason that an Indian tribe is not included among those persons, firms, corporations, *et al.*, required to file an income tax return, and, therefore, it is evident that Congress did not intend to make such income subject to a tax either as to the tribe or on distribution to the members thereof. The income received by said tribe is not income upon which Congress may impose a tax under the Constitution of the United States for the reason that the tribe is a semi-dependent political entity and not brought

within the provisions of the taxing power of the United States under its constitution; that since it was not the intention of Congress to tax the income of the Indian tribes, and since the income of such tribes may not be taxed, the same cannot be taxed upon distribution to the members thereof, or their heirs.

—*Pollock* v. *Farmers Loan & Trust Company*, 157 U. S. 429.

That the income received by said tribe is not income upon which Congress may impose a tax under the Constitution of the United States and the Sixteenth Amendment thereof, nor has it attempted to do so.

V.

Petitioner asks for a reversal of the findings and conclusions of said Circuit Court of Appeals for the reason that they have decided a federal question in a way probably in conflict with the applicable decisions of this court, and contends that the rule announced by this court in the cases of *LaMotte* v. *United States*, 254 U. S. 570; *United States* v. *Ramsey*, 271 U. S. 467; *Choate* v. *Trapp*, 224 U. S. 665; *United States* v. *Rickert*, 188 U. S. 432, and *Elk* v. *Wilkins*, 112 U. S. 95, are in conflict with the decision of said Circuit Court of Appeals.

VI.

Your petitioner asks for a review and reversal of the judgment of the Circuit Court of Appeals for the reason that it is in conflict with the decision of the Circuit Court of Appeals of the United States for the Third Circuit in the case of *Lewellyn* v. *Colonial Trust Co.*, 17 Fed. (2d) 36.

VII.

Your petitioner also asks for a review and reversal of the judgment of the Circuit Court of Appeals on the ground and for the reason that the income of the tribe derived from mineral resources is a part of the capital assets of the tribe and does not constitute income to the members thereof on distribution as defined by the income tax laws of the United States.

Wherefore, your petitioner respectfully prays that a writ of *certiorari* be issued out of and under the seal of this honorable court directed to the United States Circuit Court of Appeals for the Tenth Circuit commanding that court to certify and send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in case numbered and entitled on its docket "No. 12, *Henry Chouteau, petitioner*, v. *Commissioner of Internal Revenue, respondent;*" and that the judgment and decree of the United States Circuit Court of Appeals for the Tenth Circuit may be reviewed by this honorable court; and that your petitioner may have such other and further relief in the premises as to this honorable court may seem meet and just; and your petitioner will ever pray.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI.*

I.

Opinion of the Court Below.

The opinion in the Circuit Court of Appeals for the Tenth Circuit has not been as yet officially reported. It was rendered on February 5, 1930, and is copied in full in the record filed in this court on pages 26-32 (Print)

II.

Jurisdiction.

Jurisdiction of this court is conferred by the judicial code, section 240 A, as amended by the Act of February 13, 1925, and as provided by Rule 38 of the revised rules of this court adopted June 5, 1928, effective July 1st, 1928, and that the date of the judgment to be reviewed is February 5, 1930, and that no petition for rehearing was filed in the Circuit Court of Appeals.

III.

Statement of Case.

A statement of the case has been given in the petition and, in the interest of brevity, will not be repeated here.

IV.

Specifications of Error.

1. The Circuit Court of Appeals erred in affirming the ruling and decision of the Board of Tax Appeals.

2. The Circuit Court of Appeals erred in holding that your petitioner was not a ward of the government of the United States.

3. The Circuit Court of Appeals erred in holding and concluding that the issuance to your petitioner of a certificate of competency under the provisions of the Act of June 28, 1906, had the effect of discontinuing the wardship existing between your petitioner and the government of the United States.

4. The Circuit Court of Appeals erred in holding in effect that the income of the Osage tribe of Indians from their mineral resources was not so impressed with a trust so as to exempt the income of your petitioner as a member of said tribe from taxation on his *pro rata* part of the same.

5. That the Circuit Court of Appeals erred in not holding and concluding (as contended by petitioner in that court) that an Indian tribe is not included among those persons, firms, corporations, etc., required to file an income tax return, and that, therefore, Congress did not intend to tax said income either to the tribe or on distribution.

6. That the Circuit Court of Appeals erred in not holding and concluding (as contended by your petitioner) that the income received by said tribe is not income upon which Congress may impose a tax under the Constitution of the United States, and that Congress had not attempted to impose such a tax.

7. That the Circuit Court of Appeals erred in refusing to hold (as contended by your petitioner) that, inasmuch as

the income of the tribe was not subject to a tax, it could not become subject thereto upon distribution to the individual members thereof, or their heirs.

8. The Circuit Court of Appeals erred in not holding that the income of said Osage tribe derived from mineral resources was part of the capital assets of said tribe and, therefore, not subject to tax on distribution to the members thereof.

Argument—*Summary.*

The Act of June 28, 1906, entitled "An act for the division of the lands and funds of the Osage Indians in Oklahoma Territory, and for other purposes," provided, among other things, that the lands of the tribe (with certain exceptions) should be divided among the members thereof by giving to each his or her fair share thereof in acres, and providing that each member should be entitled in his first selection to one hundred sixty (160) acres, and that after each member had made his first selection he should be permitted to make a second selection of one hundred sixty (160) acres, and that, after each member had made his second selection, he should be permitted to make a third selection of one hundred sixty (160) acres, and that he should designate which one of his selections should be his homestead, and his certificate of allotment and deed should designate the same as such.

It is also provided that, after each member had made his first, second and third selections of one hundred and sixty (160) acres, the remaining lands of the tribe (with

certain exceptions) should be divided as equally as practicable among the members by a commission to be appointed to supervise the selection and division thereof.

The minerals under all of the Osage lands were expressly reserved to the tribe by section 3 of said act, which is as follows:

> "That the oil, gas, coal, or other minerals covered by the lands for the selection and division of which provision is herein made are hereby reserved to the Osage tribe for a period of twenty-five years from and after the eighth day of April, nineteen hundred and six; and leases for all oil, gas, and other minerals, covered by selections and division of lands herein provided for, may be made by the Osage tribe of Indians through its tribal council, and with the approval of the Secretary of the Interior, and under such rules and regulations as he may prescribe: *Provided,* that the royalties to be paid to the Osage tribe under any mineral lease so made shall be determined by the President of the United States: And *provided further,* that no mining of or prospecting for any of said mineral or minerals shall be permitted on the homestead selections herein provided for without the written consent of the Secretary of the Interior: *Provided, however,* that nothing herein contained shall be construed as affecting any valid existing lease or contract."

All funds belonging to the tribe and money due or that might become due, were to be held in trust by the United States for a period of twenty-five (25) years from and after January 1, 1907 (with certain exceptions).

The first subdivision of section 4 of the act is as follows:

"That all the funds of the Osage tribe of Indians and all the moneys now due or that may hereafter be found to be due to the said Osage tribe of Indians, and all moneys that may be received from the sale of their lands in Kansas under existing laws, and all moneys found to be due to said Osage tribe of Indians on claims against the United States, after all proper expenses are paid, shall be segregated as soon after January first, nineteen hundred and seven, as is practicable and placed to the credit of the individual members of the said Osage Tribe on a basis of a *pro rata* division among the members of said tribe, as shown by the authorized roll of membership as herein provided for, or to their heirs as hereinafter provided, said credit to draw interest as now authorized by law; and the interest that may accrue thereon shall be paid quarterly to the members entitled thereto, except in the case of minors, in which case the interest shall be paid quarterly to the parents until said minor arrives at the age of twenty-one years: *Provided*, that if the Commissioner of Indian Affairs becomes satisfied that the said interest of any minor is being misused or squandered he may withhold the payment of such interest: And *provided further*, that said interest of minors whose parents are deceased shall be paid to their legal guardians, as above provided."

The second subdivision of said section is as follows:

"That the royalty received from oil, gas, coal, and other mineral leases upon the lands for which selection and division are herein provided, and all moneys received from the sale of town lots, together with the buildings thereon, and all moneys received from the sale of the three reservations of one hundred and sixty acres each heretofore reserved for dwelling purposes, and all moneys received from grazing lands, shall be

placed in the Treasury of the United States to the credit of the members of the Osage tribe of Indians as other moneys of said tribe are to be deposited under the provisions of this act, and the same shall be distributed to the individual members of said Osage tribe according to the roll provided for herein, in the manner and at the same time that payments are made of interest on other moneys held in trust for the Osages by the Unites States, except as herein provided."

After the expiration of the period of twenty-five (25) years from January 1, 1907, the lands, mineral interests and moneys, provided in said act to be held in trust, should become the absolute property of the individual members of the tribe according to the rolls provided for in the acts unless otherwise provided by Act of Congress. This trust period has now been extended by the Act of March 2nd, 1929 (45 Stat. L. 1478), until January 1, 1959, unless otherwise provided by Act of Congress.

Section nine of the Act of June 28, 1906, *supra*, provided for the biennial election of officers for the Osage tribe. It is as follows:

"That there shall be a biennial election of officers for the Osage tribe as follows: A principal chief, an assistant principal chief, and eight members of the Osage tribal council, to succeed the officers elected in the year nineteen hundred and six, said officers to be elected at a general election to be held in the town of Pawhuska, Oklahoma Territory, on the first Monday in June; and the first election for said officers shall be held on the first Monday in June, nineteen hundred and eight, in the manner to be prescribed by the Commissioner of Indian Affairs, and said officers shall be

elected for a period of two years, commencing on the first day of July, following said election, and in case of a vacancy in the office of principal chief, by death, resignation, or otherwise, the assistant principal chief shall succeed to said office, and all vacancies in the Osage tribal council shall be filled in a manner to be prescribed by the Osage tribal council, and the Secretary of the Interior is hereby authorized to remove from the council any member or members thereof for good cause, to be by him determined."

It will, therefore, be observed that the oil, gas and other mineral rights were not allotted in severalty to the various members of the tribe but were reserved to said tribe in common; that the lands should be leased by the tribe through its tribal council with the approval of the Secretary of the Interior—funds derived therefrom to be deposited in the Treasury of the United States to the credit of the members of the tribe and to be thereafter disbursed to the individual members, according to the roll in the manner and at the same time payments are made of interest on other funds held in trust for the Osages by the United States government.

It will be observed that Congress preserved the tribal government of the Osages and provided a manner in which their officers should be elected and authorized such officers to act for the tribe in its semi-sovereign capacity.

The certificate of competency issued to your petitioner, under sudivision seven (7) of section two (2) of said act, authorized your petitioner to sell and convey any of the *lands deeded to him (except his homestead), but it did not authorize him to sell the oil, gas, or other minerals* covered

by said lands, which minerals were expressly reserved to the use of the tribe, nor did not authorize him to sell, or convey his interest (or any part thereof) in the mineral underlying the original reservation, which was allotted in severalty under the Act of 1906, or said tribe, and, as to said minerals, he is still restricted.

As above stated, *the mineral rights have never been allotted in severalty, nor has any member of the Osage tribe, regardless of quantum of blood, or the issuance of a certificate of competency, ever been authorized by Congress to sell or dispose of his interest in said minerals so reserved to the tribe,* and the court below was in error when it held that the effect of the above section was to fully emancipate the Indian receiving it (certificate of competency) from further governmental control and supervision of his property except his homestead.

The Act of April 12, 1924 (34 Stat. L. 94), being an act amendatory of the Act of June 28, 1906, provides that any right to, or interest in, the lands, moneys, or mineral rights as provided in the Act of Congress approved June 28, 1906, and amendatory and supplementary acts thereof, vested in, determined, or adjudged to be the right or property of any person not an Indian by blood, may with the approval of the Secretary of the Interior, and not otherwise, be sold, assigned and transferred under such rules and regulations as the Secretary of the Interior may prescribe.

There is no Act of Congress authorizing any member of the tribe, whether he had a certificate of competency or not and regardless of quantum of blood, to sell, assign or

transfer his interest in the tribal mineral properties, or in any other tribal property.

Supporting Reasons—*Number 1.*

Your petitioner has been consistently dealt with by Congress of the United States as a ward since the passage of the Act of June 28, 1906.

The Act of April 18, 1912 (37 Stat. L. 86), section 3, gives the County Courts of Oklahoma jurisdiction in probate matters to appoint guardians and administer all estates of the allottees of said tribe without regard to the fact of whether or not a certificate of competency has been issued. It provides that a copy of all papers filed in the County Court (in such cases) shall be served upon the Superintendent of the Osage Agency at the time of the filing thereof, and the Superintendent is authorized whenever the interest of the allottee requires to appear in said court for the protection of the allottee's interest.

It will be noticed that this act makes no distinction between those members of the tribe that have a certificate of competency and those that do not have the same. If your petitioner is not a ward of the government what authority has Congress to authorize the Superintendent of the Osage tribe of Indians to superintend regularly and control a proceeding instituted by him in the County Court of Oklahoma?

Section 8 of the same act is as follows:

"That any adult member of the Osage tribe of Indians not mentally incompetent may dispose of any or

all of his estate, real, personal, or mixed, including trust funds, from which restrictions as to alienation have not been removed, by will in accordance with the laws of the State of Oklahoma: *Provided*, that no such will shall be admitted to probate or have any validity unless approved before or after the death of the testator by the Secretary of the Interior."

Under the Act of March 3, 1921 (41 Stat. L. 1249), section 3, all members of the tribe without regard to whether they have certificates of competency are made citizens of the United States, but the act provides that this shall not affect their interest in tribal property or control of the United States over such property.

Under the Act of February 27, 1925 (43 Stat. L. 1008), section 4, the Secretary of the Interior is authorized to revoke a certificate of competency issued to a member of the Osage tribe of more than one-half Indian blood.

Section 5 of this act is as follows:

"No person convicted of having taken, or convicted of causing or procuring another to take, the life of an Osage Indian shall inherit from or receive any interest in the estate of the decedent, regardless of where the crime was committed and the conviction obtained."

Also, section 7 is as follows:

"Hereafter none but heirs of Indian blood shall inherit from those who are of one-half or more Indian blood of the Osage tribe of Indians any right, title, or interest to any restricted lands, moneys, or mineral interests of the Osage tribe: *Provided*, that this section shall not apply to spouses under existing marriages."

These acts are cited to show that Congress has consistently dealt with your petitioner, he being an Osage Indian by blood (although with a certificate of competency), as being a ward of the government. It is for Congress to say when the wardship shall cease.

That your petitioner is a ward of the government—see *LaMotte v. United States*, 254 U. S. 570.

Supporting Reasons—*Number II.*

We submit that the court below erred in holding that the money paid to this petitioner, as his part of the proceeds of the Osage tribe of Indians derived from the mineral interests of said tribe, was subject to an income tax, and that this petitioner because of having a certificate of competency was in a different position from that of Mary Blackbird as to whom the Circuit Court of Appeals held that because she was an Indian without a certificate of competency her income was not subject to the payment of an income tax.

34 Ops. Attorney General 439, wherein the Attorney General held that the income of Quapaw Indians derived from their restricted lands was not subject to the payment of a federal income tax.

—*Elk* v. *Wilkins*, 112 U. S. 95;
Lewellyn v. *Colonial Trust Co.*, 17 Fed. (2d) 36;
Choate v. *Trapp*, 224 U. S. 665.

Supporting Reasons—*Number III.*

The Osage Tribe of Indians is not included among those persons, firms, corporations, et al., required to file an income tax return.

These tribes have been repeatedly held by various decisions of this court to be a semi-dependent political body with certain rights to govern themselves and to control their internal affairs unless the same is taken away from them by Act of Congress or by treaty.

—*Cherokee Nation* v. *Georgia*, 5 Peters 1;
United States v. *Lariviere*, 93 U. S. 192;
United States v. *Kagama*, 118 U. S. 375;

See Treaty of November 10, 1808, between United States and Osage Tribe of Indians (Kappler's Laws and Treaties, Vol. 2, p. 95), and subsequent treaties.

It is certain that Congress has not required an Indian tribe to file an income tax return or a fiduciary return showing the distributive interests of members of the tribe, in the income of the tribe as Congress did require of partners, firms, corporations, associations, *et cetera*.

Supporting Reasons—*Number IV.*

The income received by the Osage tribe of Indians is income which Congress may not impose a tax against under the Constitution of the United States, nor has it attempted to do so.

The Osage tribe of Indians can neither sue nor be sued without special authority given by Act of Congress (see

31 C. J. 488, and authorities cited thereunder). If Congress attempted to and could tax the income of the tribe it would make no difference as to the extent of the wrong done the tribe by reason of the income being improperly taxed. The tribe is left without remedy to have the same corrected. Congress certainly did not intend to impose a tax upon any person, corporation or entity of any character without affording to such entity a means by which it could be relieved from erroneous or illegal taxes. The doors of the courts of the land are closed to the tribe. Congress evidently had in mind either that the income of Indian tribes was not taxable or it had no intention of taxing the same. Except from the general status of an Indian tribe, the early history of the tribe and its relations to the government of the United States, there is little to be found bearing directly upon the question as to whether Congress could or could not impose a direct tax on such tribe. Evidently, however, the framers of the constitution were of the opinion that Indian tribes and the members thereof should not be subject to taxation for it is provided in section 2, article 1 of the constitution, that apportionment of representatives and direct taxes shall be made among the states, "excluding Indians not taxed." No other persons were excluded. Evidently the use of the term "excluding Indians not taxed" in connection with the term "direct taxes" implies the proposition that Indians were not to be taxed either by the state or by the federal government. The Sixteenth Amendment to the Constitution of the United States was adopted in order

to get rid of the proposition of apportionment and did not extend the power of Congress to new subjects of taxation.

Peck v. *Lowe*, 247 U. S. 165;

Stanton v. *Baltic Mining Company*, 240 U. S. 103;

Eisner v. *Macomber*, 252 U. S. 189.

The doctrine of *Elk* v. *Wilkins*, 112 U. S. 95, has never been questioned:

> "The Indian tribes, being within the territorial limits of the United States, were not strictly speaking, foreign states; but they were alien nations, distinct political communities, with whom the United States might and habitually did deal, as they thought fit, either through treaties made by the President and Senate, or through Act of Congress in the ordinary forms of legislation. The members of those tribes owed immediate allegiance to their several tribes and were not part of the people of the United States. They were in a dependent condition, a state of pupilage, resembling that of a ward to his guardian. Indians and their property, exempt from taxation by treaty or statute of the United States, could not be taxed by any state. General Acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them."

Under the Constitution of the United States and the general policy of the government in all of its dealings with Indian tribes, the same was done by treaty. The policy of the government was changed so that in place of treaties all matters relating to Indian tribes and Indians were cared for by Act of Congress. Manifestly, any general Act of

Congress which does not specifically refer to Indian tribes or Indians would not include them.

—*Choate* v. *Trapp*, 224 U. S. 665.

"Every individual" is broad enough to include the officials and instrumentalities of the states, but the judiciary may well assume and does assume that Congress never intended to extend the statute to objects beyond its constitutional power, and, again, if a special treaty is made, a general taxing statute is not presumed to abrogate such treaty.

"Every individual" means simply every individual within the purview of the statute, but such general legislation is not applied to a subject-matter, which has been dealt with in special legislation, unless such a purpose is clearly indicated. As Endlich says in his "Interpretation of Statutes" (section 25):

> "Language is rarely so free from ambiguity as to be incapable of being used in more than one sense; and to adhere rigidly to its literal and primary meaning in all cases would be to miss its real meaning in many. If a literal meaning had been given to the laws which forbade a layman to lay hands on a priest, and punish all who drew blood on the street, the layman who wounded a priest with a weapon would not have fallen within the prohibition, and the surgeon who bled a priest in the street to save his life would have been liable to punishment."

These familiar illustrations are cited in *United States* v. *Kirby*, 7 Wallace 482, to exemplify the rule that:

> "The laws should receive a sensible construction. General terms should be so limited in their application

as not to lead to injustice, oppression or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over the letter."

No case better illustrates the error of a too rigid adherence to mere words than the leading case of the *Church of the Holy Trinity* v. *United States*, 143 U. S. 457, where Congress had passed a law containing a sweeping and unqualified prohibition of any assistance or encouragement to aliens to migrate to this country "to perform labor or services of any kind in the United States." See also:

United States v. *Delaware & Hudson Co.*, 213 U. S. 366.

In *Lewellyn* v. *Colonial Trust Co.*, 17 Fed. (2d) 36, the Circuit Court of Appeals, Third Circuit, dealing with right to tax the Osage Indians, said:

"*Third.* That as legislation imposing taxation by government on citizens must be clear and free from doubts and all doubts therein must be resolved in favor of the citizens, *Gould* v. *Gould*, 243 U. S. 151; *United States* v. *Field*, 255 U. S. 257, any legislation by government imposing taxation on its dependent ward must be in certain and indubitable terms. *Choate* v. *Trapp*, 224 U. S. 665.

"*Fourth.* That in the absence of any expressed purpose of Congress to change the uniform and unbroken policy of the government to regard and deal with the Indian tribes as wards and dependents, the purpose and intent of Congress to change that policy and impose a tax by government on its ward will not

be implied and the general terms of the income tax statute should not be construed to embrace the Indian wards of the government. In support of this, reference is made to the *Quapaw Indians*, 34 Opinions Attorney General 439, where it is said: 'In other words, it is not lightly to be assumed that Congress intended to tax the ward for the benefit of the guardian:' and *Choate* v. *Trapp, supra*, where it is said: 'The construction, instead of being strict, is liberal, doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and depend wholly upon its protection and good faith.'

"A conclusion in line with the *United States* v. *Rickert*, 188 U. S. 432, and *Elk* v. *Wilkins*, 112 U. S. 94, where it is said: 'It is well established that general Acts of Congress do not apply to Indians unless so worded that they clearly manifest an intention to include them in their operation'."

The decision in the *Lewellyn* case was reversed by the Supreme Court (275 U. S. 32) on the ground that a lessee of Indian lands came within the purview of the taxing statute.

We submit that the income tax statute, Act of 1918 (40 Stat. 1057), and the Act of 1921 (42 Stat. 227), which provide that "the net income of every individual" shall be subject to income tax should not be construed to apply to your petitioner.

Supporting Reasons—*Numbers V, VI and VII.*

The income of the tribe not being subject to a tax it cannot become subject to tax upon distribution to the members thereof.

If our position is correct, as hereinbefore set forth, that the income of the tribe is not subject to taxation, whether it be from want of power in Congress to provide for the taxing of the same or whether it be because Congress did not intend to tax the same, necessarily it would follow that this income when distributed among the members of the tribe is not subject to tax, because if it were taxed it would defeat the purpose of Congress in not attempting to tax it, or it would be taxing income which was immune from taxation at its source.

—*Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S. 429.

In the case of *Gillespie* v. *Oklahoma*, 257 U. S. 501, it is said:

> "But it may be argued that the *Pollock* case was decided before the passage of the Sixteenth Amendment to the Constitution, authorizing the Income Tax Law. In *Brushaber* v. *Union Pacific Railroad Company*, 240 U. S. 1, which was the first case after the adoption of the Sixteenth Amendment involving the constitutionality of the Income Tax Act, the Supreme Court decided that the amendment did not confer upon Congress any new taxing power but served only to remove the limitation with reference to apportionment. It thereby removed the obstacle pointed out in the *Pollock* case, but did not change the law that *where the source is not taxable neither is the income.*" (Italics ours.)

Since the argument heretofore set out in this brief applies in principle to this proposition, it is not thought necessary to dwell at length upon the same. The control of

the United States over property as a guardian which it holds in trust for a tribe of Indians is the same in principle, so far as burdening the property with taxation is concerned, as property owned by the United States.

In 37 Cyc, page 865, it is said:

> "The United States has no authority to tax the property of the state, nor has the state power to extract revenue from the property of the federal government, and, from the nature of the case, neither will lay taxes upon its own property."

All that has heretofore been said with reference to the non-taxability of the funds coming to the petitioner by reason of his allotment as a member of the Osage tribe of Indians applies equally to the funds received by him as an heir of a member of the Osage tribe of Indians, and to interest on trust funds and rents from lands held in trust.

—*United States* v. *Bean*, 253 Fed. 1.

Section six of the Act of Congress of June 28, 1906, authorized members of the tribe to make wills, subject to the approval of the Secretary of the Interior, and in such wills the individual allottee may dispose of his or her lands, moneys and mineral interests as provided for in said Act of Congress.

Section five of said act provides that after the period of twenty-five years the lands, moneys and mineral interests referred to in said section shall become the absolute property of the individual allottees or their heirs.

Section seven provides that the surface of the land is set aside for the sole use and benefit of the individual mem-

bers of the tribe entitled thereto, or their heirs, for twenty-five years from January 1st, 1907, but that leases on said lands by the allottee, or heirs, are subject to the approval of the Secretary of the Interior.

By the Act of Congress of March 3rd, 1921, a distinction was made between members of the tribe and their heirs who do not have certificates of competency and those who do have certificates of competency in that, where members of the tribe have certificates of competency they shall continue to receive the full amount of their interest in the accumulated funds of the tribe quarterly, while, if they do not have certificates of competency, they may only receive $1,000.00 quarterly, the remainder of the accumulated funds belonging to such Indian, whether coming from his own allotment or as an heir of another Indian shall be disposed of by the Secretary of the Interior as provided in said act and held in trust for the benefit of such Indian.

These statutes clearly place the inherited interests received by the members of the Osage tribe of Indians in exactly the same status as in the share or allotment of such member. This matter was specifically dealt with in the case of *LaMotte* v. *United States*, 256 Fed. 5, paragraph three of the syllabus in said case reads as follows:

> "Under First Allotment Act, June 28, 1906, sections 2-7, 12, held that the Secretary of the Interior is required to approve a lease of lands allotted under the statute and held by minors or other incompetent Indians, whether such lands came to them by allotment, descent, or devise, and whether the lease was arranged by a parent, guardian, or administrator, who might or

might not be a non-member of the tribe, or an Indian certified as competent, or was approved by the state County Court."

This case was taken on appeal to the United States Supreme Court and is found in 254 U. S., page 570, 65 L. ed. 410, wherein the position taken by the Circuit Court of Appeals for the Eighth Circuit with reference to the status of the heirs was approved. The *LaMotte* case did not deal with the disposition of the tribal funds, but had to do with the control and jurisdiction of the Secretary of the Interior over the allotted lands, whether in the hands of the original allottee or an heir of such allottee.

It is claimed by the respondent that because this petitioner received a certificate of competency under the terms of the seventh paragraph of section 2 of the Act of June 28, 1906 (34 Stat. L. 539), that he is placed in a different position with reference to being liable for an income tax than what he would be if he had not received such certificate of competency. It will be noted, however, that all the granting of a certificate of competency does under said act is to authorize the allottee to sell, lease, or otherwise dispose of his surplus lands and does not in anywise change his status as a member of the Osage tribe of Indians.

This question was before the Supreme Court of the State of Oklahoma in the case of *Neilson* v. *Alberty*, 129 Pac. 847. In the opinion in said case, on page 851, it is said:

"While we entertain no doubt on the conclusions reached, yet, if a doubt existed, it is one that under the uniform holdings of the Supreme Court of the United

States for more than 100 years must be resolved in favor of the defendant in error. *Tiger* v. *Western Investment Co.*, 221 U. S. 298, 31 Sup. Ct. 578, 55 L. ed. 738; *Choate* v. *Trapp*, 224 U. S. 665, 32 Sup. Ct. 565, 56 L. ed. 941; *United States* v. *Celestine*, 215 U. S. 278, 30 Sup. Ct. 93, 54 L. ed. 195. We do not believe the statute authorizing the issuance of certificates of competency can be given greater effect than the words used by their clear meaning import. There is a material distinction between the removal of restrictions on alienation of allotted lands, and the issuance of a certificate of competency, predicated upon the applicant being competent and capable of transacting his own business and caring for his own affairs; and this is particularly true when the effect of the issuance of the certificate is defined in the act itself. Congress acted within the scope of its reserved power in the passage of the Allotment Act. It was for the Osage Indians and their benefit and advancement that it undertook to legislate, and not for their creditors. The latter would be no worse off than at the time of the creation of the obligation upon which the judgment was obtained."

It must be borne in mind that the mineral interests from which the greater part of the income involved herein comes are tribal property held in trust by the United States for the tribe; also, that the lands and moneys of this petitioner from which the remainder of the income herein comes are restricted property held in trust by the United States for him.

—*United States* v. *Ramsey*, 271 U. S. 467.

Supporting Reasons—*Number VIII.*

The Osage tribe of Indians being a distinct political entity and not being subject to the income tax laws of the

United States, all of its resources, whether physical property, income derived therefrom, or interests of any other kind, are the capital assets of said tribe, and the same may all be used by the United States whenever it sees fit and in whatever way it sees fit for the benefit of said tribe. Said income may be re-invested and re-employed by the United States for the interest of said tribe if it so sees fit without distributing any of it to the members of said tribe, or to their heirs, the only requirement being that Congress may exercise its power and authority in that regard by adopting a new act with reference thereto—hence, it must follow that, so far as the members of said tribe are concerned, when any part of the assets of the tribe comes to them upon distribution, it comes to them as a part of the capital assets of the tribe and not as income as defined by the income tax laws of the United States.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers in order that your petitioner may have justice, and that a writ of *certiorari* should be granted, and this court should review the decision of the Circuit Court of Appeals for the Tenth Circuit and finally reverse the same.

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